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No. 89-106

In The

Supreme Court of the United States

October Term, 1988

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased and MARY JO POSS, Individually,

Petitioners,

vs.

KENNETH A. AZAR, M.D.
WILLIAM B. SWAN, SHERIFF, COUNTY OF MCDUFFIE, GEORGIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE CASE

This is an attempt to appeal a per curiam affirmance, without opinion, by the Eleventh Circuit and Court of Appeals.

This case came on to be tried before the Court and a jury on April 18, 1988. At the close of the evidence by the Petitioners, the Respondents County of McDuffie, Georgia and William B. Swan, Sheriff, made a Motion for Directed Verdict. This Motion was granted on April 19, 1988. Judgment was entered thereon on April 27, 1988 which was affirmed by the Eleventh Circuit on a per curiam affirmance, without opinion, on April 17, 1989.

Respondents County of McDuffie County, Georgia and William B. Swan, Sheriff, agree with the Petitioner's Statement of the Case except that the following facts should be added:

That after the Decedent was released from the Regional Hospital he was returned to Thomson, Georgia by his father (Petitioner) and left at his apartment (R9-176). Subsequent to that time, Decedent was involved in an auto-bus accident and was arrested by the City of Thomson Police Officers, Green and Newsome. (R9-94). He was taken into custody and released on bond (R9-94) at the request of Petitioner.

Respondent Swan saw and observed the Decedent at this time and suggested that Green and Newsome keep him in custody (R9-258). After the incident Swan went to the High School where Decedent had been (R9-281) (R9-259) to see the Assistant Principal. It was at this time that Swan determined that the Decedent was unstable (R9-259). Officer Newsome of the City of Thomson was

with the Sheriff. They determined that Green had the Decedent in the car and was taking him home, however, the Sheriff, intending to do what he thought was best, instructed Green to take the decedent to jail (R9-261). When they arrived at the jail, Officers Green and Newsome locked the Decedent up and failed to search him at that time (R9-124-125). Both of these officers were employed by the City of Thomson (R9-125). At the time of the incident in question the Decedent was placed in the City jail by City Officers (R9-125). The City jail and the County jail are in the same building but are separate facilities (R9-118-123) (R9-237-238). The City jail was under the authority of Chief Jack Garrison (R9-125). Seconds after Decedent was placed in the City jail by City police officers, he shot himself with a pistol as a result of the failure of City police officers to search him.

The Respondent Swan was a friend of the Decedent's family. On October 15, 1984, Swan went to the emergency room of McDuffie Hospital with Decedent's aunt and uncle (R9-54). After the incident at the jail, Swan brought the Pastor down to the emergency room. (R9-183). The Sheriff and the Petitioners had a close relationship (R9-273). It was the Sheriff's intent to place the Decedent in protective custody (R9-261). At that time, the Sheriff assumed that the two City Police Officers would search him and not lock him up with a weapon on him (R9-265). At the time that the Sheriff ordered that the Decedent be taken to jail, he was doing what he though was best (R9-266).

On both occasions that the Decedent was taken into custody on October 16, 1984, he was in the custody of the

City of Thomson (R9-276) and was placed in the City of Thomson Jail facility.

The only evidence presented by Petitioners as to the liability of the County of McDuffie was the testimony of Swan which explained the relationship between the Sheriff and the County. In essence this testimony showed that the County merely funded the jail.

SUMMARY OF ARGUMENT

Petitioners seeks a review of a per curiam affirmance without opinion by the United States Court of Appeals for the Eleventh Circuit and of the Trial Courts' grant of Respondent's Motion for Directed Verdict.

A. As to Respondent McDuffie County:

The County of McDuffie is not liable for the acts of the Sheriff. The Sheriff is a constitutional officer of the State and except for funding, the County has no control of the policies of the Sheriff.

In this case, the Petitioners have not shown a willful indifference of the County by the institution of customs or policies which violate the constitutional rights of the Decedent. This is a case of failure to search a prisoner.

In this particular case, the Petitioners have alleged in the Complaint that the County failed to train its officers. Assuming arguendo that the County is responsible for the Sheriff, the County would not be liable as the Sheriff had in place a policy that all prisoners be searched. Further, the incidents herein occurred in the City jail for

which the County had no responsibility. In addition, the search was performed by the City police officers over whom the County had no authority or control nor did the County have a duty to train the City police officers.

B. As to Respondent William B. Swan, Sheriff:

The District Court was correct when it granted the Motion for Directed Verdict of Sheriff William B. Swan. It was the contention of Sheriff Swan that if all of the evidence was construed most favorable for the Petitioners there is not the inference that the acts of Sheriff Swan rose to the level of a deliberate and conscious indifference so as to deprive the Decedent of his constitutional rights through gross negligence or otherwise.

In this case, the evidence shows that the event under investigation occurred almost instantaneously. The event here resulted as a result of ordinary negligence in failing to search a potential inmate. Here, we are not dealing with a result that came as a failure to prescribe suicide precautions and the operation of the jail in so far as caring for the medical needs of inmates. There was in place a policy in both the City jail and County jail to search all prisoners. The incident in this case occurred because two city police officers did not search the Decedent. This was negligence but did not arise to the level of a constitutional tort. In this case, the Sheriff, a close friend of Decedent's family, acted not out of a willful or reckless indifference for the Decedent, but out of a genuine concern for the Decedent.

Respondent, avers that there is no basis in law or fact for any of the petitioner's claim.

Accordingly, the Petition for Certiorari should be denied.

ARGUMENT

Petitioners failed to prove that there was a constitutional deprivation as a result of an official custom or policy of McDuffie County and accordingly the Petition for Certiorari should be denied.

The only evidence presented by Petitioners concerning the relationship between the County and the Sheriff of McDuffie County was through the testimony of Swan (R9-235). Basically, the County provided the funding to the jail and the Sheriff was responsible for the policies, practices and procedures for the operation of his department. He, the Sheriff, is responsible for prisoners in his jail (R9-236). Likewise, the testimony of Swan was that the City jail and the County jail were separate (R9-237). Further, the evidence was that the Sheriff trained his people at the CSRA Law Enforcement Training Center (R9-239). The Sheriff maintains certified jailers (R9-247). There was no evidence presented by the petitioners that the training at the CSRA Law Enforcement Training Center was inadequate or that the jailers were not certified.

Mere lack of due care by a State official does not deprive an individual of life, liberty or property under the Fourteenth Amendment of the Constitution of the United States. *Daniels vs. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986). Accordingly in order for the Petitioners to prevail under 42 USC 1983 they must prove that their Decedent suffered a constitutional deprivation which

resulted from an official custom or policy; *Bradberry vs. Pinellas County*, 789 F.2d 1513 (11th Cir. 1986); *Anderson vs. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985), and when the plaintiff carries the burden of proof that an injury was inflicted as the *result* of a governmental policy or custom then the government would be liable. *Monell vs. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). However, the government cannot be subjected to Section 1983 liability on theories akin to "respondent superior". See *City of Oklahoma vs. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1983). Moreover, in order for the Petitioners to subject the government to liability pursuant to Section 1983, there must be some causal connection between the policy or custom and the constitutional violation alleged.

> "But *Monnell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy". At the very least, there must be an *affirmative link between the policy and the particular constitutional violation alleged.*" (Emphasis added).

City of Oklahoma vs. Tuttle, supra, at page 823. See also *Anderson vs. City of Atlanta*, 778 F.2d 678 (11th Cir. 1985).

A Motion for Direct Verdict should be granted in two situations: (1) Where there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense; or (2) Where there are no controverted issues of fact upon which reasonable men should differ.

The Petitioners have utterly failed to prove that there was a policy or custom of the County which proximately caused the death of their Decedent. Without proof of a custom or policy and some *affirmative link* between the custom or policy of the governing authority and the injury or constitutional deprivation there can be no recovery. *City of Oklahoma vs. Tuttle, supra.* Further there is no showing of a duty on the part of the County to train City employees (Green and Newsome) or to regulate activities in the City jail. As the trial judge observed, virtually the only mention of McDuffie County was that the events occurred in McDuffie County. Therefore, there was a complete lack of proof and the Court was correct in directing a verdict in favor of the County. *Respondent superior theories will not form a basis for recovery under 42 USC 1983.* Consequently, the judgment of the trial court and appellate court should be affirmed.

CONCLUSION

The Standard of Review on the grant of a Motion for Directed Verdict is the same for the Appellate Court as the trial court. *Alman Bros. Farms Feed & Mill, Inc. vs. Diamond Labs, Inc.*, 437 F.2d 1295 (1971). There are two situations in which the Motion should be granted: 1) Where there is a complete absence of pleading or proof of an issue or issues material to the cause of action; or 2) Where there are no controverted issues of fact upon which reasonable men could differ. *5 Moore, Federal Practice,* Sec. 5002 [1] (2d Ed. 1969).

The material issue in this case was whether or not the Petitioners' Decedent had been deprived of his constitutional right to life, liberty or property by an act of the Respondent Sheriff which rose above mere negligence and official custom or policy of Respondent McDuffie County. As to this burden of proof, the Petitioners have failed to prove the violation of a constitutionally protected right. Further, Petitioners have failed to show any official custom or policy of Respondent McDuffie County which proximately caused constitutional deprivation. The Petitioners have also failed to prove that the Respondent Sheriff committed any act that amounted to a "deliberate indifference" to the rights or needs of the Decedent which were constitutionally protected. There are no controverted facts upon which reasonable men can differ. While the failure to each was negligent, such failure committed by City police officers did not constitute a "deliberate indifference" on the part of the Sheriff or McDuffie County so as to impose liability pursuant to 42 USC 1983. Thus, the Judgment of the trial court and the per curiam affirmance without opinion by the Eleventh Circuit should be affirmed as to both of these Respondents regardless, in that the decisions were correct under the standard of review in this case.

Accordingly, the Petitioners prayer for a writ of certiorari to review the Eleventh Circuit decision in this case should be denied by this Honorable Court.

Respectfully submitted,

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